In The

Supreme Court of the United States

October Term, 1970

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1235

UNITED STATES OF AMERICA,

Respondent,

vs.

FRANCIS De ANGELIS and ROBERT MILLER,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners FRANCIS DeANGELIS and ROBERT MILLER petition this Court for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Second Circuit, entered December 18, 1970 (Docket No. 35362).

The judgment affirmed the convictions for possession of stolen goods, while moving in interstate commerce, in violation of 18 U.S.C. 659, after a jury trial in the Eastern District of New York (No. 67CR417). See Appendix A.

Opinion Below

The Court of Appeals did not write an opinion.

The District Court did state for the record its

opinion with respect to the issue posed. See Appendix B.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is vested pursuant to 28 U.S.C. 1254(1).

Constitutional Provisions Involved

The Fourth Amendment to the United States Constitution, prohibiting unreasonable search and seizures, is well known to members of this Court.

Issue Involved

May probable cause to arrest (as a prerequisite to search and seize) be found on the basis of information acquired by a surveilling agent, when such information is not conveyed to the agents who either did actually effect the arrest or who did control the investigation and make the decision to arrest?

Was the District Court in error in imputing the knowledge of the surveilling agents to the arresting agents in order to find probable cause?

Preliminary Statement

Both petitioners were convicted of possession of stolen goods which were in an enclosed lot in Queens, New York, on November 6, 1967. The petitioners were in the lot at that time. The FBI agents arrested the petitioners, and seized the cartons which they were loading onto a truck.

The suppression application produced the only genuine issue for the District Court.

While the District Court questioned the standing of the petitioners, nevertheless the court conducted a full suppression hearing, and found probable cause for the underlying arrest. In open court, the Court of Appeals agreed there was probable cause — the court did not concern itself with standing.

Three agents participated in the arrest (McGooey, Kilcommins, and Sherill). Two other agents (Bepko and Carew) were sent by the agent in charge (McGooey) to surveill the lot. BEPKO and CAREW testified they saw the cartons in question had REA (Railway Express) markings. There had been testimony that a stolen Railway Express truck had been seen leaving that lot several hours previously.

However, none of the arresting agents (McGooey, Kilcommins and Sherill) knew at the moment of arrest that the cartons had REA labels, and that they had come from the stolen trucks. The two surveilling agents (Bepko and Carew) had not conveyed to their fellow agents this information. At the time of the arrest none of the arresting agents knew that the cartons were from Railway Express.

The District Court held it was immaterial that the arresting agents did not know what the surveilling agents had seen — it was of no significance that Bepko and Carew did not tell McGooey-Kilcommins-Sherill of the markings on the cartons. Let us not forget that the REA markings was the

only evidence linking these cartons to the stolen REA truck. The District Court held that all the information gathered by each of the agents must be considered — even though it may not have been considered by the arresting agents, or the agent who gave the signal to arrest.

In this regard, the District Court stated:

> "The defendants claim that since actually McGooey did not have knowledge that these packages — personal knowledge that these packages were stolen packages or were really the REA packages, that he didn't have probable cause to make the arrest, and that it was his knowledge that was crucial, and that he couldn't take advantage of the fact that the other two agents who were working with him and under him, as I recall, his supervision, had the requisite knowledge, to wit, that these packages were REA packages.
>
> I do not agree with the defendants' contention. It is my opinion that one must look at this arrest being made by a unit of FBI agents and if the unit had the necessary knowledge to constitute probable cause I think the arrest is legal."

During the oral argument in the Court of Appeals, the Court indicated this was the only legal issue presented by the suppression hearing, and of course they did not agree with the defense contention.

Reasons for Granting the Writ

The issue of who must know of the contraband quality of the goods in question to justify the arrest, and the subsequent search and seizure, is novel. To date, the courts have always considered themselves with what was learned — how much information did the arresting agents possess. This petition now presents the issue of which persons must be in possession of the necessary incriminating information. Should it be limited to those agents who actually effect the arrest, plus the agents who actually control the investigation, and make the decision to arrest? Or should it encompass any and all agents who in some way, be it limited or substantial, direct or remote, participate in the investigation — whether or not their information is forwarded to those agents who make the decision to arrest, and/or actually effect the arrest?

Apparently, there are no reported opinions on this question. The District Court decided the issue de novo, and the Court of Appeals chose not to write on the subject. However, it is an important question at law. Its resolution at this time will contribute significantly to the guidelines which this Court has promulgated in recent years in the field of search and seizure.

Conclusion

The petition should be granted.

Respectfully submitted,

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January 1971

Appendix A - Order

UNITED STATES COURT OF APPEALS
For the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December, one thousand nine hundred and seventy.

Present:

HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Francis Paul DeAngelis, et al.,

Defendants,

Francis Paul DeAngelis and Robert Miller,

Defendants-Appellants.

Appendix A – Order

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

Appendix B - Opinion

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- :

FRANCIS DeANGELIS and ROBERT MILLER, :

Defendants. :

----------X

BARTELS, J.

* * *

According to the testimony Agents McGooey and Bepko were riding in a car, I think some time around 9:00 o'clock on the morning of November 6, 1967 when they saw an REA truck leave the premises at 20th Avenue and 49th Street, which is a vacant lot, and pictures of which have been submitted to the Court, and which at least one witness described as a junkyard.

At all events, after taking the license number of this truck they radioed headquarters to ascertain whether the truck had been missing or was in the act of performing a legitimate task.

They received a reply from headquarters which had called up the REA offices that the truck was missing or stolen. After that — after receiving that knowledge they were then ordered by head-

quarters to conduct a surveillance of the property. Two other agents, I think, were sent down. One of them in a radio car with Agent Carew. A surveillance was conducted from a porch next to the premises and at that time they saw a U-Haul truck enter the premises. And according to two of the agents, Carew and Bepko, there was on the lot a pile of packages which had REA symbols and shipping labels I think he said, on these packages.

They saw the defendants in the act of loading these packages on the U-Haul truck. After observing this procedure they were instructed to close in and the agent in charge, Mr. McGooey, had been standing down at the foot of the porch, and both agents Carew and Bepko had shouted to McGooey that they were – that they, these defendants were loading the stuff or loading the swag on the U-Haul truck.

Mr. McGooey himself testified that he, while these agents, that is McGooey – I mean Carew and Bepko had told him what they saw, nevertheless testified that he personally didn't know whether these were REA packages, but he assumed that they were, as I recall.

* * *

He assumed that they were REA packages, or were the stolen packages. He said he didn't know himself. He said he looked through the fence for a few seconds and saw the activity that was going on. But he did say that these two agents had told him what they had seen.

• • •

The defendants claim that since actually McGooey did not have knowledge that these packages — personal knowledge that these packages were stolen packages or were really the REA packages, that he didn't have probable cause to make the arrest, and that it was his knowledge that was crucial, and that he couldn't take advantage of the fact that the other two agents who were working with him and under him, as I recall, his supervision, had the requisite knowledge, to wit, that these packages were REA packages.

I do not agree with the defendants' contention. It is my opinion that one must look at this arrest being made by a unit of FBI agents and if the unit had the necessary knowledge to constitute probable cause I think the arrest is legal.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1235

FRANCIS DEANGELIS AND ROBERT MILLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion the judgments rendered below (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1970. The petition was filed on January 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was probable cause to believe that petitioners were in possession of stolen interstate freight so as to justify their arrest and the search incident thereto.

416-815—71

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of one count of knowingly and unlawfully receiving stolen interstate freight in violation of 18 U.S.C. 659.[1] Petitioner DeAngelis was sentenced to two years' imprisonment, and petitioner Miller received a five year sentence, one month's imprisonment with the balance to be served on probation.

Prior to trial, petitioners moved to suppress evidence of cartons of freight seized incident to their arrest. The district judge twice held that petitioners lacked standing under Rule 41(e) of the Federal Rules of Criminal Procedure to complain of the alleged unlawful search and seizure (H, I 52; H, II 118). However, a full suppression hearing was conducted and at its conclusion the court ruled that the seizure was not unlawful (H, II 119).

The investigation which culminated in petitioners' arrests began on the morning of November 6, 1967, when special agents of the FBI's hijacking squad observed a Railway Express Agency (REA) truck leaving premises which appeared to them as a "junkyard or parking lot, or some kind of enclosed yard" (H, I 55). Because the yard had no apparent connection with REA, either as a loading or delivery

[1] We are lodging with the Clerk the transcript of trial (Tr., Volumes I, II, and III) and of the hearings on petitioners' motion to suppress (H, Volumes I and II).

point, the agents became suspicious and, accordingly, instituted a stolen vehicle check (H, II 7; H, I 56). Shortly thereafter, the agents received a radio report from FBI headquarters informing them that the truck had in fact been stolen (H, I 57). They were then directed to establish surveillance of the lot and other members of the hijacking squad were dispatched to offer assistance (H, I 146).

Two of the agents established an observation post in a factory diagonally across from the yard in question (H, I 114). On two separate occasions a man later identified as Paul DeVilla[2] was observed surveying the area in front of the lot, leading the agents to believe a "security check" was being conducted (H, I 115, 116). A short while later, these same agents observed a U-Haul truck being backed into the lot, with petitioner DeAngelis directing the maneuver (H, I 116–117). A continuous surveillance of the lot had established that no other vehicle and no other persons had attempted to enter the lot prior to this time. With the arrival of the U-Haul truck, these observations were transmitted to FBI headquarters and instructions were received to continue the surveillance and to "move in" if any activity indicated the freight was about to be moved (H, I 61, 118).

At this point, two other agents established surveillance from the porch of a house situated so that they could observe activities within the lot itself (H,

[2] DeVilla was indicted with petitioners but his case was severed prior to the commencement of this trial (Tr. I 19).

II 11, 60). Both saw cartons being loaded into the U-Haul by petitioners (H, II 11, 61) and each noticed REA symbols affixed to some of these packages (H, II 11, 62). They then communicated to Agent McGoey, who was controlling the activities and who later made the decision to arrest, that the "stuff" or the "swag" (a law enforcement term for stolen goods (H, II 12)) was being loaded onto the truck (H, II 12, 62). While not in a position to observe activity within the lot as accurately as the agents on the porch, Agent McGoey was able to glance briefly through a fence and see that the cartons were in fact being loaded (H, I 62). McGoey then made the decision to "move in". He and other agents entered the lot (H, I 65), arrested petitioners and seized the cartons.

ARGUMENT

Petitioner contends that because Agent McGoey (who made the decision to arrest) had no personal knowledge that the cartons seized had REA markings, there was insufficient probable cause for the arrest. Given the circumstances preceding the arrest, the existence of probable cause was in no way dependent upon anyone's having actually seen the REA markings. Agent McGoey, an experienced member of the FBI's hijacking squad (Tr. I 23), had knowledge of a series of events which strongly suggested that a pick-up of stolen freight was about to take place at the lot under surveillance. Information that cartons were being loaded onto the U-Haul, coupled with his personal observation in this respect, confirmed the suspicion.

At this point prompt action was necessary to prevent successful completion of the crime. Accordingly, Agent McGoey decided to "move in". To argue that probable cause was lacking because McGoey did not personally view REA markings on the cartons is to require a standard wholly inconsistent with this Court's admonition that probable cause is to be derived from "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act", *Brinegar* v. *United States*, 338 U.S. 160, 175.

Even if knowledge of the REA markings on the cartons be deemed an essential component of probable cause here, there is still no difficulty with this case since it is clear that two of the agents had in fact seen the markings. Although they did not communicate to Agent McGoey the full details of their observations, having informed him only that the stolen goods were being loaded, Agent McGoey quite reasonably assumed they were referring to the freight stolen from the REA truck. It is not essential that an arresting officer have personal knowledge of every or, indeed, any component of probable cause. It is sufficient that within the investigating unit there is sufficient collective awareness of the circumstances constituting probable cause. *United States* v. *Bianco*, 189 F. 2d 716 (C.A. 3); *Smith* v. *United States*, 358 F. 2d 833 (C.A. D.C.); *United States* v. *Pitt*, 382 F. 2d 322 (C.A. 4); *Moreno-Vallejo* v. *United States*, 414 F. 2d 901 (C.A. 5). The collective knowledge of the agents working together in this case was properly considered in determining probable cause.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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WILL WILSON,
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FEBRUARY 1971.

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